D.A. 3-4-93

007

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 79,371

STATE OF FLORIDA, DEPARTMENT
OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Petitioner/Appellant/
Cross-Appellee,

-vs-

RICHARD RAMPELL,

Respondent/Appellee/
Cross-Appellant.
_____/

FILED
SID J. WHITE
OCT 30 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

REPLY BRIEF OF CROSS-APPELLANT ON THE MERITS

Robert M. Montgomery, Jr., Esq.
MONTGOMERY & LARMOYEUX, P.A.
1016 Clearwater Place
West Palm Beach, FL 33401
and
Philip M. Burlington, Esq. of
EDNA L. CARUSO, P.A.
Suite 4-B/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
(407) 686-8010
Attorneys for Respondent/Appellee
Cross-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PREFACE

This is an appeal from a Final Judgment of the Circuit Court, which was affirmed in part and reversed in part by the Fourth District Court of Appeals. The parties will be referred to by their proper names or as they appeared in the trial court. The following designations will be used:

(R) - Record-on-Appeal
(SR) - Supplemental Record
(A) - Appellant's Appendix
(AA) - Appellee's Appendix

STATEMENT OF THE FACTS

The Board's Statement of the Facts contains essentially argumentative statements attempting to justify the prohibition against direct, in-person, uninvited solicitation. The Board cites the deposition and affidavit of Louis Dooner, and the deposition of Jerome Schine, as providing the justification for the prohibition, i.e., protection of the independence of CPAs performing audits. However, both those witnesses acknowledged that there was no empirical data supporting the contention that such solicitation leads to collusion between a CPA and the potential client, and Schine acknowledged that he was not aware of one example of an audit failure resulting from solicitation (Dooner Dep. 50-51, Schine Dep. 21-22). Additionally, Dooner acknowledged that the AICPA rejected the prohibition against direct, in-person, uninvited solicitation on the basis that there was no empirical evidence to justify it (Dooner Dep. 50-51, Joint Ex. C p.4). There is also no factual basis for the Board's contention that allowing solicitation

for other CPA services would adversely affect the integrity of the attest function.

The Board's Statement of the Facts also does not acknowledge that Dooner specifically testified, and the Board's counsel represented to the trial court, that the prohibition was not intended to protect the public from solicitors (Dooner Dep. 66, SR110). While the Board's position is that the prohibition is justified by the need to ensure the independence of the audit or attest function, its Statement of Facts does not acknowledge that the Board has issued letter opinions permitting direct, in-person, solicitation at breakfast clubs, luncheon clubs, Rotary clubs, Kiwanis, and country clubs (Plaintiff's Ex. #1, p.69-71). No attempt is made to reconcile those exemptions with the purported justification of protecting the independence of the attest function. Indisputedly, the same nefarious sub rosa communications can occur in that context, yet no regulation of it is deemed to be necessary.

The Board also makes certain characterizations regarding the "Survey on Prohibitions on Advertising and Solicitation Prepared for the American Institute of Certified Public Accountants" (Joint Ex.D). The Board inaccurately states that the survey indicated that two-thirds of the CPAs responding had "grave difficulties" with any uninvited solicitation (Board's Answer Brief p.5, fn.1). The survey never used the term "grave difficulties," but simply made the statement that "two-thirds of the AICPA membership have negative attitudes toward direct, uninvited solicitation" (Joint

Ex.C, p.19). The motivation behind the negative attitudes toward solicitation is discussed in the survey and includes such concerns as, inter alia, that elimination of the prohibition would lower CPA fees, increase litigation against CPAs, and encourage government regulation of the profession (Joint Ex. C, p.20).

The Board also states that the survey questions were "loaded" because they only asked each member if he or she would be unethical if permitted to solicit (Board's Answer Brief p.5, fn.1). That is simply false. The questionnaire asked members general opinion questions regarding whether solicitation lowered the quality of services performed by CPAs or impaired their independence, and a "substantial majority" answered those questions in the negative (Joint Ex. C, p.11, 25). It is also inaccurate to say that the survey resulted in the AICPA Special Committee on Solicitation receiving "the advise it wished," since the members of the committee repeatedly expressed their disappointment with the recommendation that direct, in-person, uninvited solicitation not be prohibited (see Plaintiff's Ex. #2, pp.169, 174, 189, 197-99, 202).

POINT I ON CROSS-APPEAL

THE FOURTH DISTRICT ERRED IN REVERSING THE TRIAL COURT'S CONCLUSION THAT THE PROHIBITION AGAINST DIRECT, UNINVITED SOLICITATION WAS UNCONSTITUTIONAL.

Rampell has never disputed the significance of the attest function, the need for CPAs to be independent in performing audits, or the State's right to regulate the profession. Similarly, the State has never disputed that solicitation by CPAs qualifies for First Amendment protection, i.e., that it is lawful activity and not misleading, see CENTRAL HUDSON GAS & ELECTRIC CORP. v. PUBLIC SERVICE COMMISSION OF NEW YORK, 477 U.S. 557, 566 (1980).[1] In fact, the United States Supreme Court recently stated that "solicitation is a recognized form of speech protected by the First Amendment," UNITED STATES v. KOKINDA, 110 S.Ct. 3115, 3118 (1990).[2] The issue in this case is whether the State satisfied its burden of justifying the infringement of Florida's CPAs' First Amendment rights when there was no empirical evidence presented to support

---

[1]/The Board expressly conceded this Point in its brief before the Fourth District (see Appellant's Initial Brief p.18), and has not receded from that concession in this Court. While the Board's brief contains some argument to the effect that commercial communications are not entitled to the same First Amendment protection as non-commercial speech, that statement of the law has never been at issue in this case.

[2]/The Amicus cites UNITED STATES v. KOKINDA, supra, as justifying the Fourth District's ruling on solicitation in this case. However, KOKINDA involved the issue of a content neutral regulation prohibiting solicitation on government property, and applied an entirely different analysis than the issue before this Court. The Court in KOKINDA simply determined that the Post Office was entitled to control conduct on its property that interfered with the Congressional Mandate for efficient postal service, where that regulation was reasonable and was content neutral.

the likelihood of harm arising from direct, in-person, uninvited solicitation.

The United States Supreme Court has repeatedly held that the State has the burden of proof to justify its restriction on free speech, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK v. FOX, 109 S.Ct. 3028, 3035 (1989); SHAPERO v. KENTUCKY BAR ASSOCIATION, 108 S.Ct. 1916 (1988). In fact, in SHAPERO, the Court stated (108 S.Ct. at 1923):

> Merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech.

Similarly, in ZAUDERER v. OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO, 471 U.S. 626, 648 (1985), the Court rejected the state's justifications for the prohibition at issue because they amounted "to little more than unsupported assertions."

The Fourth District in this case upheld the prohibition against solicitation without determining that it was inherently misleading, although it framed that as the "dispositive question," 589 So.2d at 1356. Instead, the Fourth District concluded that in-person solicitation was "particularly susceptible to abuse" and, therefore, the State could constitutionally prohibit it, despite the absence of any empirical data demonstrating that it had been misused by CPAs. But, as held in SHAPERO v. KENTUCKY BAR ASSOCIATION, supra, the mere possibility of abuse is insufficient to justify an infringement on First Amendment rights.

By the nature of their profession, CPAs provide services to sophisticated clients, and not to ordinary and possibly ignorant or naive laymen such as personal injury attorneys often do. Contrary to the Board's contention, the sophistication of the audience is not only an appropriate consideration, but a necessary one, as expressly stated in BATES v. STATE BAR OF ARIZONA, 433 U.S. 350, 383, fn.37 (1977):

> The determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience. [Citation omitted.] Thus, different degrees of regulation may be appropriate in different areas.

The Board has failed to cite one instance of a defective audit, overreaching, fraud or any other misconduct arising out of direct, in-person, uninvited solicitation by CPAs. Since such conduct is permissible in forty-six states,[3] certainly if it was likely to lead to misconduct there would be an empirical basis for the Board's assertion.

The Board's purported concern that a CPA that engages in direct, in-person, uninvited solicitation might enter into some type of sub rosa communications compromising his integrity is mere

---

[3]/The Board cites the fact that three other states, and the Internal Revenue Service, prohibit direct solicitation as supporting the Fourth District's decision. However, none of those prohibitions have been challenged on constitutional grounds. The Louisiana statute was challenged solely on antitrust grounds, but the prohibition was immune to that challenge because it had been approved by the legislature, UNITED STATES v. STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANTS OF LOUISIANA, Civ. No. 83-1947, 1987, West Law 7905 (E.D.La. 1987). The fact that three states and one government agency have adopted such a prohibition does not constitute empirical data supporting the Fourth District's decision, nor the Board's arguments.

speculation and, under established case law, is insufficient to justify the admitted infringement on the CPAs' First Amendment rights. If the State is permitted to impose a prohibition against in-person solicitation on the basis of such a weak evidentiary showing, it would be empowered to prohibit any "non-memorialized communication" between a client and a CPA on the very same rationale. Moreover, it is unlikely that a CPA would make such a proposition to a potential client, since it would be extremely risky to propose such improper conduct without any certainty that it would be favorably received. It is more likely that an established client-CPA relationship would result in collusion and defective audits, as the recent Savings and Loan scandals have amply demonstrated.

Also, unlike attorneys, who regrettably have a history of abuse involved in direct solicitation, CPAs have no such history.[4] In fact, despite many reported lawsuits over defective audits and other accounting malpractice, the Board has failed to cite one instance where such conduct arose out of solicitation. Instead, the record shows, without dispute, that the prohibitions against solicitation by accountants arose out of anticompetitive motivation, i.e., the attempt to minimize encroachment on practitioner's clients, and not any perceived harm to the public.

The Board contends that Rampell is misreading the Fourth District's decision in challenging its reliance on THE FLORIDA BAR

---

[4]/CPAs are also generally prohibited from representing clients on a contingency basis, Fla. Stat. §473.319; unlike attorneys.

v. SCHREIBER, 407 So.2d 595 (Fla. 1981), opinion vacated, 420 So.2d 599 (Fla. 1982); and Article I, §23 of the Florida Constitution. There has been no misreading. The court relied specifically on the SCHREIBER decision, and quoted extensively from it despite the fact that it was vacated on its merits after IN RE: R.M.J., 455 U.S. 191 (1982), was decided. No justification for reliance on a vacated decision has been provided by the Board.

Additionally, SCHREIBER relied on Article I, §23 of the Florida Constitution to uphold the challenged prohibition against attorney solicitation. The opinion contains a footnote specifically justifying that reliance on the basis that "as officers of the court, attorneys carry some hue of governmental color," 407 So.2d at 598, fn.6. The Fourth District's decision quoted that portion of the SCHREIBER decision and relied on the right of privacy to justify upholding the prohibition in the case," 589 So.2d at 1357. However, there is no constitutional right of privacy in Florida, except with respect to the prevention of governmental intrusions, see Article I, §23, Florida Constitution. The application of that constitutional provision to prohibit conduct by private entities is not justified either by its language, its purpose, or case law. The Board has provided no justification for the unwarranted extension of that constitutional provision, and the Fourth District's decision does not provide any either.

The Board contends that the prohibition against direct, in-person, uninvited solicitation is an appropriate time, place,

and manner restriction, an argument that was never raised in the trial court or in the Fourth District. Moreover, that analysis is clearly inapplicable since the prohibition at issue is not "content neutral." As noted in NATIONAL FUNERAL SERVICES, INC. v. ROCKEFELLER, 870 F.2d 136, 141 (4th Cir. 1989), "The essence of time, place and manner restrictions is content neutrality." Additionally, there is no time or place in which direct, in-person, uninvited solicitation can occur.

The "time, place, or manner" test was developed for evaluating restrictions on expression taking place on public property, which had been dedicated as a "public forum," WARD v. ROCK AGAINST RACISM, 491 U.S. 781 (1989). The United States Supreme Court has applied that analysis on one occasion to private property, that being the zoning ordinance in CITY OF RETTON v. PLAYTIME THEATRES, INC., 475 U.S. 41 (1986). The Court there held that the zoning ordinance at issue, which applied to adult motion picture theatres, was not aimed at the content of the film shown, but rather the secondary effects of such theatres on the surrounding community, 475 U.S. at 49. The ordinance also did not eliminate adult motion pictures within the city, but only prohibited them from locating within 1,000 feet of a residential zone, single or multiple family dwelling, church, park, or school. Thus, the means of expression at issue was not entirely banned; as it is in the case sub judice.

BARNES v. GLEN THEATRE, INC., 111 S.Ct. 2456 (1991), did not have a majority opinion and, therefore, the opinion written by Chief Justice Rehnquist does not, of course, constitute an adoption

by the court of his rationale. Moreover, the ordinance at issue in that case simply prohibited nude dancing in public and, thus, permitted the same expression to occur in a different context, i.e., a different "time, place, or manner."

There is no basis to apply the "time, place, or manner" analysis under the facts of this case. There is no time or place in which direct, in-person, uninvited solicitation can occur. Moreover, the prohibition in this case is not content neutral, but applies to a very specific subject of expression, i.e., the offer to provide the services of a CPA. It is instructive to note that none of the cases relied upon by the parties addressing such prohibitions on professions utilize the "time, place, or manner" analysis, but rather utilize the analysis promulgated in CENTRAL HUDSON v. PUBLIC SERVICE COMMISSION, supra. That is the appropriate analysis, and is, in fact, relied upon by the Board in Point I of its brief. The argument contained in Point II of its brief is simply irrelevant, since it applies the wrong analysis to the issue before this Court.

The Board raises an issue regarding Rampell's standing to challenge the prohibition at issue, an issue that has never been raised previously in this lawsuit. Contrary to the Board's assertion, Rampell's standing is not based solely on his desire to engage in solicitation, but rather because the Board pursued disciplinary proceedings against him arising out of his utilization of that method of communication. The Board cites no authority for the proposition that an adjudication of that charge is a necessary

prerequisite to a First Amendment challenge, and, indeed, there is no such authority. Moreover, as discussed in Point II, infra, Rampell also has standing to challenge the prohibition as being unconstitutionally vague.

In summary, the Fourth District erred in reversing the trial court's determination that the prohibition against direct, in-person solicitation was unconstitutional. The Board's justification for the prohibition is totally unsupported by any record evidence or empirical data and, thus, it has failed to satisfy its burden of proof of justifying the regulations admitted infringement on CPAs' First Amendment rights. Therefore, the Fourth District's decision should be quashed to the extent that it reversed the trial court's ruling.

POINT II ON CROSS-APPEAL

THE FOURTH DISTRICT ERRED IN REVERSING, SUB SILENTIO, THE TRIAL COURT'S RULING THAT THE PROHIBITION AGAINST DIRECT, IN-PERSON, UNINVITED SOLICITATION WAS UNCONSTITUTIONALLY VAGUE.

The Board fails to provide any explanation why the Fourth District failed to address the trial court's determination that the prohibition at issue was impermissibly vague. Instead, it attempts to rely on other cases involving solicitation as supporting the proposition that there is no ambiguity in this case. However, the prohibition in this case involves "direct, in-person, uninvited solicitation" [Emphasis supplied]. As explained in the Initial Cross-Appeal Brief, the Board's experts found it difficult to determine the applicability of the prohibition to very basic and recurring facts. The term "uninvited" is the source of the ambiguity. The vagueness of that term is apparent from the fact that it justifies the bizarre exception that CPAs are entitled to engage in direct, in-person solicitation without restriction at breakfast clubs, civic organizations, and country clubs, because in that context the Board deems that such solicitation is "invited." The Board admittedly has no guidelines as to the scope of the social occasions on which direct, in-person solicitation is permitted (Dooner Dep. 74, Plaintiff's Ex. #1, p.74). Thus, there has been no administrative clarification of that ambiguity.

The Board cites VILLAGE OF HOFFMAN ESTATES v. FLIPSIDE, HOFFMAN ESTATES, INC., 455 U.S. 489 (1982), for the proposition that a statute or regulation cannot be challenged by a plaintiff as

being unconstitutionally vague when the plaintiff's conduct is clearly proscribed by the regulation at issue. However, in a footnote to the very quotation relied upon by the Board, the United States Supreme Court specifically excepted cases involving First Amendment rights from that proposition, VILLAGE OF HOFFMAN v. FLIPSIDE, 102 S.Ct. at 1191, fn.7. Additionally, the quotation relied upon by the Board also limits the statement of law by stating "assuming the enactment implicates no constitutionally protected conduct...." Therefore, Rampell has standing to challenge the prohibition at issue as being unconstitutionally vague.

In summary, the Board's response to this argument is to simply ignore it. The Board does not explain its "social club" exception in any rational way, and it does not address its own experts' and attorney's admission that the terms utilized are ambiguous. The Fourth District's decision similarly does not address the issue. It is respectfully submitted that this Court should quash the Fourth District's decision and uphold the trial court's determination that the prohibitions at issue are impermissibly vague and, thereby, unconstitutional.

CONCLUSION

For the reasons stated above, this Court should affirm the Fourth District's determination that the prohibition against competitive bidding is unconstitutional, and quash that portion of that Fourth District's Order that holds that the prohibition against direct, in-person, uninvited solicitation is constitutional.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to JOHN J. RIMES, III, ESQ., Dept. of Legal Affairs, Ste. LL04, The Capitol, Tallahassee, FL 32399-1050; KEN EASLEY, ESQ., 1940 N. Monroe St., Ste. 60, Tallahassee, FL 32399-0792; and KENNETH R. HART, ESQ., 227 S. Calhoun St., Tallahassee, FL 32302, by mail, this 29th day of October, 1992.

Robert M. Montgomery, Jr., Esq. of
MONTGOMERY & LARMOYEUX, P.A.
1016 Clearwater Place
West Palm Beach, FL 33401
and
Philip M. Burlington, Esq. of
EDNA L. CARUSO, P.A.
Suite 4-B/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
(407) 686-8010
Attorneys for Respondent/Appellee
Cross-Appellant

By: _____
PHILIP M. BURLINGTON
Florida Bar No. 285862

GGF/FLORIDA.RB/GG